

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | | |
|-----------------------------|---|-------------------|
| STIEFEL LABORATORIES, INC., | : | Civil Action No. |
| | : | |
| Plaintiff, | : | 1:08-CV-03773-CAP |
| | : | |
| vs. | : | |
| | : | |
| BROOKSTONE | : | |
| PHARMACEUTICALS, L.L.C. | : | |
| | : | |
| Defendant. | : | |

PLAINTIFF’S INITIAL DISCLOSURES

A. Plaintiff’s Initial Disclosures.

(1) State precisely the classification of the cause of action being filed, a brief factual outline of the case including plaintiff’s contentions as to what defendant did or failed to do, and a succinct statement of the legal issues in the case.

This is a case asserting claims for false advertising and unfair competition under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-372, O.C.G.A. § 10-1-373 and Georgia common law. The Plaintiff, Stiefel Laboratories, Inc. (“Stiefel”), markets Brevoxyl Gel, a prescription drug for the treatment of acne. Defendant Brookstone Pharmaceuticals, Inc. (“Brookstone”) markets a so-called “generic” version of Brevoxyl Gel called “BPO Gel.” Stiefel alleges that Brookstone has engaged in false advertising and unfair competition under the Lanham Act and Georgia law by marketing BPO Gel

as a generic equivalent to Brevoxyl Gel when, according to Plaintiff, BPO Gel is not truly a generic equivalent of Brevoxyl Gel. Defendant's false and misleading statements have caused pharmacists to dispense BPO Gel as a substitute for prescriptions for Brevoxyl Gel, causing Stiefel lost sales and profits. Pursuant to 15 U.S.C. § 1116, Stiefel seeks preliminary and permanent injunctive relief to stop Defendant's alleged false and misleading marketing practices. Stiefel also seeks actual and consequential damages, along with treble damages under 15 U.S.C. § 1117(a). Stiefel further seeks fees, costs and expenses under 15 U.S.C. § 1117(a), O.C.G.A. § 10-1-372, and O.C.G.A. § 10-1-373.

(2) Describe in detail all statutes, codes, regulations, legal principles, standards and customs or usages, and illustrative case law which plaintiff contends are applicable to this action.

This case asserts claims for false advertising and unfair competition under the Lanham Act, 15 U.S.C. § 1051 *et seq.*; the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-372, O.C.G.A. § 10-1-373; and Georgia common law.

(3) Provide the name and, if known, the address and telephone number of each individual likely to have discoverable information that you may use to support your claims or defenses, unless solely for impeachment, indentifying the subjects of the information.

See Attachment A.

(4) Provide the name of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. For all experts described in Fed. R. Civ. P. 26(a)(2)(B), provide a separate written report satisfying the provisions of that rule.

Expert witness disclosures will be provided in the future in accordance with the Federal Rules of Civil Procedures and any local rules or orders of this Court. Accordingly, there is no Attachment B at this time. Plaintiff will supplement its disclosures at the appropriate time.

(5) Provide a copy of, or a description by category and location of, all documents, data compilations, and tangible things in your possession, custody, or control that you may use to support your claims or defenses solely for impeachment, identifying the subjects of the information.

See Attachment C.

(6) In the space provided below, provide a computation of any category of damages claimed by you. In addition, include a copy of, or describe by category and location of, the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered, making such documents or evidentiary material available for inspection and copying as under FED. R. CIV. P. 34. (Attach any copies and descriptions to Initial Disclosures as Attachment D.)

Plaintiff's calculation of the exact amount of their damages will be based, in part, on information produced by the Defendant and third parties in this case. Pursuant to the Lanham Act, 15 U.S.C. § 1117(a), Plaintiff's damages include Defendant's profits on sales of BPO-4 Gel and BPO-8 Gel; Plaintiff's lost sales of BREVOXYL®-4 Gel and BREVOXYL®-8 Gel, and the costs of the action. Plaintiff's lost sales of BREVOXYL®-4 Gel and

BREVOXYL®-8 Gel will be based on a calculation of units of BPO-4 Gel and BPO-8 Gel sold multiplied by Plaintiff's per unit profit margin. Plaintiff's damages may also include cancellation fees, lost opportunities, punitive, exemplary, or additional damages, and attorneys' fees.

Documents in the possession, custody or control of Plaintiff that support its claim for damages, including sales and cost information for BREVOXYL®-4 Gel and BREVOXYL®-8 Gel, will be produced or made available for copying in a time, place and manner agreed upon by the parties, subject to the entry of an appropriate protective order within 30 days of the filing of the first answer. Accordingly, there is no Attachment D at this time. Plaintiff will supplement its disclosures at the appropriate time.

(7) Attach for inspection and copying as under Fed. R. Civ. P. 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part of or all of a judgment which may be entered in this action or to indemnify or reimburse for payments made to satisfy the judgment. (Attach a copy of insurance agreement to Initial Disclosures as Attachment E.)

Not applicable.

(8) Disclose the full name, address, and telephone number of all persons or legal entities who have a subrogation interest in the cause of action set forth in plaintiff's cause of action and state the basis and extent of such interest.

None

February 5, 2009

s/ William B. Hill, Jr.

William B. Hill, Jr.

Georgia Bar No. 354725

R. Lawrence Ashe, Jr.

Georgia Bar No. 024500

Yonette Sam-Buchanan

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Counsel for Plaintiff

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CERTIFICATE OF COMPLIANCE

I, **WILLIAM B. HILL, JR.**, certify that **Plaintiff's Initial Disclosures** complies with Local Rules 5.1B and 7.1D. I further certify that, in preparation of this document, the foregoing document was prepared with font Times New Roman, 14 point, to include all text, including headings, footnotes, and quotations.

s/William B. Hill, Jr.

William B. Hill, Jr.

Georgia Bar No. 354725

ATTORNEYS FOR PLAINTIFF

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Telephone: 404.253.6000
Telecopier: 404.253.6060
Email: williamhill@asherafuse.com

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2009, I caused **Plaintiff's Initial Disclosures and Its Attachments A and C** to be filed electronically with the Clerk of the Court using the ECF-system for the Northern District of Georgia and that the ECF-system will send a Notice of Electronic Filing to the following CM/ECF participants:

Counsel for Defendant:

L. Matt Wilson
Simon Jenner

By email address at:

matt@willaw.com
simon@willaw.com

Counsel for Plaintiff:

William B. Hill
R. Lawrence Ashe, Jr.
Yonette Sam-Buchanan
Matthew S. Knoop
Saul Perloff
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sperloff@fulbright.com
kgrant@fulbright.com

I further certify that I caused a copy of the foregoing document(s) and the Notice of Electronic Filing to be mailed by first class mail, postage paid, to the following non-ECF Participant(s): **NONE**.

s/ William B. Hill, Jr.

William B. Hill, Jr.
Georgia Bar No. 354725
ATTORNEYS FOR PLAINTIFF

ASHE, RAFUSE & HILL, LLP
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In the United States District Court
Northern District of Georgia, Atlanta Division

* * * * *

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Stiefel Laboratories, Inc.

v.

Brookstone Pharmaceuticals, L.L.C.

PLAINTIFF'S ATTACHMENT A

1. The following individuals may have discoverable information regarding the marketing, production and sales of BREVOXYL® and the marketing activities of Brookstone as well as the financial impact on BREVOXYL®-4 Gel and BREVOXYL®-8 Gel's sales. These individuals may be contacted through Plaintiff's counsel.

William Humphries
President
Stiefel Laboratories

James Hartman
Senior Vice President, U.S. Commercial Operations
Stiefel Laboratories

Jeron Evans
Executive Director – U.S. Prescription Marketing
Stiefel Laboratories

Wayne Wilson
Vice President, U.S. Sales
Stiefel Laboratories

Christopher Billis
Associate Director of Marketing, Brevoxyl and Evoclin,
Stiefel Laboratories

Randy S. Place
Finance Analyst
Stiefel Laboratories

2. The following individuals may have discoverable information concerning the development of BREVOXYL®, its formulation and chemical makeup; and testing conducted on BREVOXYL®.

Karl F. Popp, R.Ph.
(former) Senior Director, Special Projects, Stiefel Laboratories
1775 Duck Pond Rd.
Schodack Landing, New York 12156
Tel. 518.732.2378

Brent D. Stiefel
Executive Vice President, Corporate Development & Product Portfolio
Stiefel Laboratories

Richard DeVillez, M.D. (consultant)
851 Westpoint Dr., Suite B10,
Wasilla, Alaska 99654
Tel. 907.357.2800

3. The following individuals may also have discoverable information acquired within the course and scope of their job positions (these individuals may be contacted through Plaintiff's Counsel):

Harry C. Klauda
Distinguished Research Fellow
Stiefel Laboratories

Gavin Corcoran, M.D.
Senior Vice President of Global Research and Development
Stiefel Laboratories

William A. Carr
Global Vice President, Supply Chain and Quality Assurance
Stiefel Laboratories

Michael DiFiore, R.Ph., Esq.
Executive Director, Managed Markets
Stiefel Laboratories

Randall Hayward
Director, Quality Assurance
Stiefel Laboratories

James Keith
Senior Director, Trade Sales
Stiefel Laboratories

Michael Foley
Regional Sales Manager
Stiefel Laboratories

Angela Boyd
Regional Sales Manager
Stiefel Laboratories

Glenn Cha
Regional Sales Manager
Stiefel Laboratories

4. Brookstone Pharmaceuticals, Inc.
9005 Westside Parkway,
Alpharetta, Georgia 30004
Tel. 678-325-5188

Brookstone Pharmaceuticals, Inc. is a Defendant in this matter and its representatives have knowledge concerning the development, product specifications, testing, marketing, and sale of BPO-4 Gel and BPO-8 Gel as well as the good manufacturing practices involved in making BPO-4 Gel and BPO-8 Gel.

5. IMS Health
901 Main Avenue, Suite 612
Norwalk, Connecticut 06851
Tel. 203.845.5200

IMS Health and its representatives may have discoverable knowledge concerning their nationwide collection of prescription pharmaceutical sales data, including sales of BREVOXYL®-4 Gel and BREVOXYL®-8 Gel and BPO-4 Gel and BPO-8 Gel.

6. RelayHealth
1564 Northeast Expressway
Atlanta, Georgia 30329-2010
Tel. 800.778.6711

RelayHealth and its representatives may have discoverable knowledge concerning their nationwide collection of prescription pharmaceutical sales data, including sales of BREVOXYL®-4 Gel and BREVOXYL®-8 Gel and BPO-4 Gel and BPO-8 Gel.

7. First DataBank, Inc.
1111 Bayhill Drive
San Bruno, California 94006
Tel. 800.633.3453

First DataBank and its representatives may have discoverable information regarding representations made to First DataBank by Brookstone regarding BPO-4 Gel and BPO-8 Gel. It may have knowledge regarding how First DataBank's database is utilized by the pharmaceutical community and the topic of drug substitutions generally.

8. Medi-Span
8425 Woodfield Crossing Blvd.
Suite 490
Indianapolis, Indiana 46240
Tel. 800.388.8884

Medi-Span and its representatives may have discoverable information regarding representations made to Medi-Span by Brookstone representatives regarding BPO-4 Gel and BPO-8 Gel. It may have knowledge regarding how Medi-Span's database is utilized by the pharmaceutical community and the topic of drug substitutions generally.

9. Gold Standard
302 Knights Run Ave, Suite 800
Tampa, Florida 33602
Tel. 813.258.4747

Gold Standard and its representatives may have discoverable information regarding representations made to Gold Standard by Brookstone representatives regarding BPO-4 Gel and BPO-8 Gel. It may have knowledge regarding how Gold Standard's database is utilized by the pharmaceutical community and the topic of drug substitutions generally.

10. The following pharmaceutical distributors and retail chain stores may have discoverable information regarding sales, prescriptions, dispensing and substitution of BREVOXYL®-4 Gel and BREVOXYL®-8 Gel, BPO-4 Gel and BPO-8 Gel and the representations of Brookstone regarding BPO-4 Gel and BPO-8 Gel.

- a. AmeriSource Bergen Corporation
4000 Metropolitan Drive
Orange, California 92868
Tel. 714.385.4000
- a. McKesson, Inc.
McKesson MedManagement/PACT, LLC
7115 Northland Terrace, Suite 500
Brooklyn Park, Minnesota 55428
Tel. 763.354.1200
- b. Cardinal Health
7000 Cardinal Place
Dublin, Ohio 43017
Tel. 614.757.5000

- c. Rite Aid Corporation
30 Hunter Lane
Camp Hill, Pennsylvania 17011
- d. Walgreen, Co.
200 Wilmott Road
Deerfield, Illinois 60015
Tel. 847.914.2500
- e. CVS Corporation
One CVS Drive
Woonsocket, Rhode Island 02895
Tel. 401.765.1500

11. Employees, former employees, consultants or experts of Defendant either listed on Defendant's disclosures or whom have testified in previous litigation regarding BPO-4 Gel and BPO-8 Gel may have discoverable information.

In the United States District Court
Northern District of Georgia, Atlanta Division

* * * * *

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PLAINTIFF'S ATTACHMENT C

Plaintiff possesses the following categories of documents that it may use in support of its claims:

1. Manufacturing records for BREVOXYL®-4 Gel and BREVOXYL®-8 Gel.
2. Sales and cost information for BREVOXYL®-4 Gel and BREVOXYL®-8 Gel.
3. Testing and assays for BREVOXYL®-4 Gel and BREVOXYL®-8 Gel.
4. Advertising and promotional materials for BPO-4 Gel and BPO-8 Gel.
5. Third-party information regarding the marketing, listing, linking, and sales of BPO-4 Gel and BPO-8 Gel, and substitution of BPO-4 Gel and BPO-8 Gel for BREVOXYL®-4 Gel and BREVOXYL®-8 Gel.

6. Documents regarding the use of benzoyl peroxide as an active ingredient in products for the treatment of acne vulgaris generally.

These documents will be produced or made available for copying in a time, place and manner agreed upon by the parties, subject to the entry of an appropriate protective order within 30 days of the filing of the first answer.